Supreme Court, U.S.
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No. 91-10

In The

Supreme Court of the United States

October Term, 1991

SPECTRUM SPORTS, INC.
and KENNETH B. LEIGHTON,

Petitioners,

v.

SHIRLEY McQUILLAN and LARRY McQUILLAN,
d/b/a SORBOTURF ENTERPRISES,

Respondents.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Does a distributor, terminated pursuant to a *per se* unlawful conspiracy to replace all regional distributors with one national distributor, who has agreed to abide by a price fixing agreement, suffer antitrust injury?

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

Two petitions for writ of certiorari were filed in this proceeding. The first, by defendants Sorbothane, Inc. ("SI"), Hamilton-Kent Manufacturing Company ("H-K") and Kenneth M. Leighton ("Leighton Senior") (the "SI Petition") raises three issues: (1) whether a verdict of attempt to monopolize under Section Two of the Sherman Act should be sustained where the jury was permitted to infer specific intent and dangerous probability of success under *Lessig v. Tidewater Oil Col.*, 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964), but also adjudged defendants liable for monopolization, thereby independently finding actual monopoly power; (2) whether on this record there was concerted activity to support the horizontal market allocation claim under *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984); and (3) whether defendants were entitled to a jury instruction on antitrust injury. Respondents address each of these issues in their opposition to the SI Petition.

The second petition, by defendants Spectrum Sports, Inc. ("Spectrum") and Kenneth B. Leighton ("Leighton Junior") (the "Spectrum Petition") raises only the *Lessig* and antitrust injury issues. The arguments raised in the Spectrum Petition as to the *Lessig* doctrine are substantially similar to those made in the SI Petition. Petitioners added in their *Lessig* discussion only the absurd argument that since Leighton Junior and Spectrum were not found liable for price fixing under Section One, the substantial evidence of their active participation in the price fixing scheme (Petitioners' Appendix, p. A20-21) was not

sufficient evidence of predatory conduct to support the *Lessig* inference of specific intent and dangerous probability of success. First, the *Lessig* inference was unnecessary, since the jury concluded that Leighton Junior and Spectrum monopolized the Sorbothane market, thus finding specific intent and actual monopoly power. Secondly, even under *Lessig*, there is no authority for the proposition that a defendant must have been found liable under Section One to have engaged in conduct "sufficiently predatory" to support a *Lessig* inference. (Such a rule would render the *Lessig* inference meaningless, since plaintiff will already be entitled to treble damages under Section One.)

Otherwise, the discussion of *Lessig* in the Spectrum Petition is the same as the SI Petition. In the interest of economy, respondents therefore respectfully refer the Court to the following portions of their opposition to the SI Petition (Docket No. 91-32): Introduction; Statement of the Case; Reasons for Denying the Petition, part A, (Standards of Rule 10); and Part B (The *Lessig* Inference was Unnecessary to the Verdict).

The discussion of antitrust injury in the Spectrum Petition varies sufficiently from the SI Petition to warrant specific rebuttal. In this opposition, respondents will therefore discuss only the issue of antitrust injury.

REASONS FOR DENYING THE PETITION

McQuillan Established Antitrust Injury as a Matter of Law.

Petitioners make two arguments as to antitrust injury, both of which can be dealt with summarily. Petitioners first attack the following language of the Ninth Circuit's opinion (affirming the District Court's finding of antitrust injury):

> Horizontal market division agreements (Section 1 claim) and attempts to monopolize (Section 2 claim) are treated as *per se* violations of the Sherman Act. Injury to competition is presumed to follow from the conduct prescribed by these sections.

Petitioners' Appendix, p. A22. The issue before this Court, however, is not whether each sentence of the Ninth Circuit's unpublished memorandum decision can be defended when presented out of context, but whether that court correctly affirmed the District Court's denial of petitioners' motion for JNOV on the issue of antitrust injury. There was no error.

Petitioners argue that the decision here is somehow inconsistent with *Atlantic Richfield Co. v. USA Petroleum Co.*, 110 S.Ct. 1184 (1990). *Atlantic Richfield* held that *per se* conduct does not presumptively result in antitrust injury to any particular plaintiff. *Atlantic Richfield's* only significance is its elimination of a presumption that, given the evidence in this case, is superfluous. McQuillan proved antitrust injury as a matter of law. She claimed and proved a single injury: The destruction of her business by the concerted refusal to sell her Sorbothane. This boycott facilitated petitioners' *per se* unlawful scheme to control

Sorbothane prices. McQuillan was the direct and foreseeable target of the conspiracy to maintain resale Sorbothane prices by terminating regional distributors and installing one national distributor. That national distributor was Leighton Junior, "an enthusiastic enforcer of H-K's price fixing agreement" (Petitioners' Appendix, p. A20). When a manufacturer, acting in concert with some of its distributors, eliminates another distributor in furtherance of a scheme to control prices, the resulting injury to the terminated distributor is antitrust injury as a matter of law. *United States v. General Motors Corporation*, 384 U.S. 127 (1966). *See also, Blue Shield of Virginia v. McCready*, 457 U.S. 465, 479 (1982) ("where the injury alleged is so integral an aspect of the conspiracy alleged, there can be no question but that the loss was precisely 'the type of loss that the claimed violations . . . would be likely to cause' ").

Petitioners' second argument is premised wholly on a misrepresentation of the record. Petitioners mislabel this a "distributor substitution" case, and then discuss inapplicable case law holding that where the only allegation is that one exclusive distributor is substituted for another, there will often be a minimal impact on competition. Petitioners then conclude that "if competition is unlikely to be affected when one exclusive distributor is replaced by another – one type of vertical restraint – then certainly the replaced distributor cannot suffer the type of damage the antitrust laws were designed to protect against [i.e., antitrust injury]." (Petition, p. 19.)

This is not, however, a "distributor substitution" case. One exclusive distributor was not merely replaced with another. Instead, defendants replaced all of the

regional distributors collectively with one national distributor so as to control Sorbothane prices in both the athletic and medical markets. This therefore is not the situation presented in *A.H. Cox & Co. v. Starr Machinery Co.*, 653 F.2d 1302, 1307 (9th Cir. 1981), where one distributor was replaced with another, without "any evidence of anticompetitive effect or intent." Here, there was ample evidence of petitioners' participation in the *per se* unlawful price fixing conspiracy. (See, Petitioners' Appendix, pp. A20-A21.) Petitioners were also found to have monopolized the Sorbothane market under Section Two, elements of which were specific intent and monopoly power (i.e., the most severe form of injury to competition).

CONCLUSION

Petitioners have not raised an issue that merits a grant of certiorari by this Court. Accordingly, this Court should deny the Petition for Writ of Certiorari.

DATED: July 25, 1991

Respectfully submitted,

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